Supreme Court, U.S.
FILED
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No. 91-870

In The

Supreme Court of the United States

October Term, 1991

ALAN A. PEIGHTAL,

Petitioner,

v.

METROPOLITAN DADE COUNTY,
Metropolitan Fire Department of Dade County,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX

ALEXANDER KAPETANAKIS

Of Counsel for
RASSNER, RASSNER, KRAMER & GOLD, P.A.
7000 S.W. 62 Avenue
Suite 500
South Miami, Florida 33143
(305) 667-0475
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

(4)

SUPPLEMENTAL APPENDIX

United States District Court

FOR THE

SOUTHERN DISTRICT OF FLORIDA

(CLOSED CIVIL CASE)

ALAN PEIGHTAL, Plaintiff, vs. METROPOLITAN DADE COUNTY, Defendant.	)	CASE NO. 86-2350-CIV-HASTINGS FINAL JUDGMENT

THIS CAUSE came for trial before the Court sitting without a jury, and the issues having been duly heard and a decision having been duly entered, it is hereby

ORDERED AND ADJUDGED that the plaintiff ALAN PEIGHTAL take nothing, that the action be dismissed on the merits and defendant METROPOLITAN DADE COUNTY shall henceforth go without day.

DONE AND ORDERED at Miami, Florida, this 25 day of April 1988.

/s/ Alcee L. Hastings
UNITED STATES
DISTRICT JUDGE
ALCEE L. HASTINGS

Copies to:
A. Kapetanakis, Esq.
J. McInnis, Asst. Dade County Attorney

United States District Court

FOR THE

SOUTHERN DISTRICT OF FLORIDA

ALAN ANDREW PEIGHTAL, Plaintiff, vs. METROPOLITAN DADE COUNTY, Defendant.	CASE NO. 86-2350-CIV-HASTINGS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE was tried to the Court, sitting without jury, and after considering the stipulation of the parties, testimony of witnesses, and the documentary and physical evidence, the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT[1]

1. Plaintiff, Alan Andrew Peightal, is a citizen of the United States and a resident of Dade County, Florida.

2. Defendant, Metropolitan Dade County (County), is a political subdivision of the State of Florida.

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[1] To the extent that the findings of fact are interpreted as conclusions of law, they are so considered. To the extent that the conclusions of law are interpreted as findings of fact, they too are so considered.

3. Plaintiff is a white male and brings this employment discrimination action alleging that he was not hired as a firefighter because of his race. Plaintiff further contends that the County failed to properly recognize his veteran status during the employment process.

4. On October 18, 1983, Alan Peightal applied for a position as a firefighter with the Metro-Dade Fire Department (Department) during the Department's 1983 recruitment. In November, 1983, he took the firefighter's entrance examination and earned a score of 98.25. His test result placed him in the 28th percentile among those applicants taking the examination.

5. Those candidates that met certain criteria[2] and received passing scores on the firefighter's examination were placed on an eligible list. Because Alan Peightal had met all of the requirements, he was placed on this list.

6. As a result of the Department's recruitment from that 1983 examination eligible list, the following candidates were hired: 23 White males, 16 Black males, 24 Hispanic males, 12 White females, 5 Black females, 4 Hispanic females. Plaintiff's Exhibit No. 7a. Alan Peightal was not hired.

7. On March 20, 1986, Alan Peightal filed a charge with the Equal Employment Opportunity Commission (EEOC). On August 12, 1986, the EEOC determined that the decision not to hire Alan Peightal was taken pursuant to the an [sic] affirmative action plan which had been adopted by the Department. Plaintiff was issued a

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[2] The basic requirements include a high school degree or its equivalent and a valid driver's license.

right-to-sue letter on this basis, and this action was thereafter commenced.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction under 28 U.S.C. §§1331, 1343 in that this action arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e *et seq.*; 42 U.S.C. Sec. 1983; the Veterans Preference Act, 5 U.S.C. Sec. 1313; and the Vietnam Era Veterans Readjustment Act of 1974.

2. This Court has jurisdiction over the parties.

3. The County is an employer within the meaning of 42 U.S.C. Sec. 2000e(b).

4. The County has the authority to implement an affirmative action plan. *South Florida Chapter of the Associated General Contractors v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984).

5. The burden is on the plaintiff in a "hiring case" to establish a prima facie case of racial discrimination. In a typical racial discrimination action, plaintiff is required to demonstrate: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). As the *McDonnell* Court noted, this framework should be modified to accommodate different employment discrimination contexts. *Id.* at 802 n. 13.

6. Thus, a "reverse discrimination" case, like the case *sub judice*, necessitates that modifications be made to the *McDonnell* framework.[3] Accordingly, a "reverse discrimination" plaintiff must show: (i) that he applied for an available position; (ii) for which he was qualified; and (iii) that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Parker v. Baltimore & Ohio Railroad*, 652 F.2d 1012, 1017 (D.C.Cir. 1981); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63 (6th Cir. 1985). These are the four elements of a typical reverse discrimination claim.

There is however a somewhat different standard that has been utilized in this Circuit. It requires the plaintiff to demonstrate that: (i) he is white; (ii) he was well qualified for the job he applied for; (iii) he was not hired; and (iv) a person of another race was hired. *Walters v. City of Atlanta*, 610 F.Supp. 715 (N.D. Ga. 1985) *aff'd in part, reversed in part* 803 F.2d 1135 (11th Cir. 1986) (remanded for a recalculation of back pay damages). Although *Walters* was affirmed, the correctness of the reverse discrimination standard was not properly presented to the Court, and consequently, the Eleventh Circuit did not expressly adopt nor discuss the four factors utilized by the district court. Its approval, if any, of the criteria was *sub silentio*,

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[3] With respect to the first prong of the *McDonnell* test, membership in a racial *minority*, it should be noted that a white male has an equal right to bring a Title VII action as does any other person. "Title VII prohibits racial discrimination against . . . white petitioners . . . upon the same standard as would be applicable were they Negroes. . . ." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976).

and therefore, on that basis the *Walters* standard is not binding on this Court. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

Moreover, to the extent that the *Walters* standard embraces the proposition that the hiring of a minority employee, without more, justifies an inference of prejudice against job applicants in the majority, the test is contrary to existing case law. "The aim in both [majority and minority] cases is to determine whether the plaintiff 'was rejected under circumstances which give rise to an inference of unlawful discrimination.' " *Bishopp v. District of Columbia*, 788 F.2d 781 (D.C.Cir. 1986), *citing Texas Department of Community Affairs v. Burdin*, 450 U.S. 248, 253-54 (1981). This Court's reading of *Walters* impermissibly allows the burden of production to shift to the employer because none of the elements require a plaintiff to establish any circumstances from which to infer the existence of discrimination. Consequently, an employer would be faced with the prospect of continually having to defend each affirmative action decision thereby creating a "significant disincentive for voluntary action" on his behalf. *Johnson* at 1451 n.8 (citations omitted).

At first blush, even the *Parker* standard may appear to have a similar burden shifting effect. The *Parker* court recognized this very problem and pointed out that it was not suggesting "that a lawful affirmative action program would in itself constitute suspicious circumstances sufficient to justify an inference of discriminatory intent under *McDonnell Douglas*."

Parker, 652 F.2d at 1017 n. 9. Hence, the *Parker* criteria requires a plaintiff to make an initial showing sufficient to raise an inference of discriminatory intent, as demonstrated by circumstances *other than* the mere existence of an affirmative action plan. The *Walters* test would only require the plaintiff to show that someone of another race was hired, and on that basis it cannot be followed. Historically, white males have not been hindered in the work place because of their race or sex and "are required to offer other particularized evidence". *Bishopp* at 786.[4]

7. Thus, under *Parker*, a plaintiff need not present direct proof of discrimination because "background circumstances" will suffice. 652 F.2d at 1018. Once the plaintiff establishes these elements, the burden of production immediately shifts to the employer to articulate a legitimate nondiscriminatory reason for his decision. *Johnson* at 1449; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

8. The "existence of an affirmative action plan provides such a [legitimate nondiscriminatory] rationale." *Johnson*, 107 S.Ct. at 1449. Although, ordinarily an employer feels compelled to present evidence in support of the plan. *Id.*

9. Once the employer articulates a legitimate nondiscriminatory reason for its decision, the burden shifts

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[4] The more difficult question, and one which was not squarely presented to the Court, is whether the existence of an affirmative action program in and of itself is a factor in the establishment of the plaintiff's prima facie case. The language in *Parker*, 652 F.2d at 1017 n. 9, suggests not. Nonetheless, the Court leaves that decision for another day.

back to the plaintiff to establish that the County's justification is merely a pretext and the affirmative action program is invalid. *Id.* Although the employer may have presented evidence to avoid the charge of pretext, the burden of proving the invalidity of the plan remains on the plaintiff. *Id.*

10. An affirmative action plan is valid if (1) it is designed to alleviate an existing " 'manifest imbalance' that reflected underrepresentation of [minorities] in 'traditionally segregated job categories' "; *Id.* at 1452 (citation omitted); (2) it does not "unnecessarily trammel the rights of [non-minorities] or create an absolute bar to their advancement"; *Id.* at 1455; (3) it is a temporary measure intended to *attain*, rather than *maintain*, a balanced work force. *Id.* at 1456.[5]

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[5] The County would impose one other factor to be considered in the assessment of the validity of an affirmative action plan: that the plan does not result in the hiring of unqualified applicants. *See* Pretrial Memorandum at 4. This factor first appeared in *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir. 1981), at a time when there was little guidance in the area from the Supreme Court.

Johnson, however, upheld employment decisions made pursuant to an existing affirmative action plan. The Court's analysis in *Johnson* of the validity of affirmative action plan was guided by its decision in *United States Steelworkers of America v. Weber*, 443 U.S. 193 (1979). Yet, neither *Weber* nor *Johnson* specifically set this factor apart. In fact, the Court in *Johnson* discussed employee qualifications only under its analysis of the "manifest imbalance" requirement. *Johnson*, at 1454. It is clear this factor should not be hoisted to the position of a separate requirement. Rather, it is only one of several considerations, in light of calculated imbalances, used to evaluate an

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11. In determining the existence of an imbalance that would justify the consideration of the race or sex of applicants, it is proper to compare "the percentage of minorities [ ] in the employer's work force with the percentage in the area labor market or general population" for positions that require no special expertise. *Johnson* at 1452. Because entry-level firefighters are not required to possess any specialized skills,[6] a comparison between the Fire Department's work force and the labor market is appropriate.

12. In this case, the Department had reviewed the composition of its work force and found women, blacks and Hispanics to be substantially underrepresented in proportion to the labor market. *See* Plaintiff's Exhibit No. 9. On this basis, the Department adopted an affirmative action plan. Although progress had been made, minorities remained underrepresented in the Department and thus the plan was still in effect when Alan Peightal became eligible. The hiring goals, however, were adjusted yearly[7] and goals were adopted for 1983. *See* Plaintiff's

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affirmative action plan. Moreover, this factor is primarily applied when an affirmative action program is challenged on constitutional, and not statutory, grounds. *See Paradise v. Prescott*, 767 F.2d 1514, 1531 (11th Cir. 1985) (discussing various types of constitutional tests employed by the courts).

[6] Although the firefighter position is described as "specialized work in the protection of life and property", Plaintiff's Exhibit Composite No. 16, there are no specialized skills per se which must be possessed in order to obtain the position.

[7] On direct examination,f [sic] Ex-Fire Chief Edward Donaldson, was questioned about the Department's definition of "hiring goals". He stated:

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Exhibit No. 7. Applicants from the eligible list were contacted in accordance with the goals.

13. The Department's plan is similar to the plan upheld in *Johnson* in that it takes into distinction the qualifications of the applicants and does not call for "mere blind hiring by the numbers". *Id.* at 1454. Instead, qualified applicants were categorized according to their particular majority or minority status *and* prioritized by examination scores. The available entry-level firefighter positions were then filled in accordance with the Department's goals aimed at correcting the existing imbalance

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> Well, I am not sure how you are using the term. We determined that a certain or set amount of females or somebody should be hired. A goal simply said that if we needed one hundred persons, and it is apparent we have mostly white males, and we look at the work force around us in percentages, we would attempt to establish some relationship between those things. We would look at the available candidates and we would attempt to set some goals for hiring that were reflective of the candidate list that we had available to us.
>
> There would be no reason, for example to have a goal of fifteen females if there are only four on the list. So, it was a fluid kind of thing. Year to year, we would balance it again. The objective was to work towards some time in the future when our work force make-up would be reflective of our community, and then we would stop that process, hopefully, and the exam would be validated and it would all work together.

Thus, the Department's plan was both remedial and temporary in nature.

and only by the qualified applicants after categorization from the eligible list.

14. The flexibility of the plan and the yearly adjustments made to it demonstrate that it utilized permissible "goals" and not "quotas". Contrary to plaintiff's suggestion, the plan does not dictate the strict numerical hiring that is characteristic of a quota. In fact, the eligible applicants were insufficient to fulfill all of the Department's hiring goals. *See* Plaintiff's Exhibit 8.

15. Thus, the plan's aim was to alleviate the existing imbalance reflected by the underrepresentation of women and minorities in the County's firefighter positions. Had the hiring taken place strictly on the basis of examination scores, the Department would have actually contributed to the underrepresentation.[8]

16. The plan does not "unnecessarily trammel" the rights of majority applicants. In fact, for the period of 1983-85, only one more Hispanic male was hired than were white males (24 versus 23). Plaintiff's Exhibit No. 7a. Overall, white applicants were hired in greater numbers than their minority counterparts. Finally, the plan was not permanent, but was designed only as a temporary measure. *See supra* note 7.

17. To the extent that Plaintiff purports to argue that Hispanics are not a class entitled to protection against discrimination under an affirmative action plan, that

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[8] For example, an examination of the eligible list discloses that of the top 100 qualified applicants on the list, only six were Hispanic, none were Black, and only one was a Female. Plaintiff's Exhibit No. 12.

claim is also without contention. *See U.S. Paradise*, ___ U.S. ___, 107 S.Ct. 1053, 1074 (1987) (affirmative action plan may "remedy unlawful treatment of racial or ethnic groups"); 42 U.S.C. §2000e(2) (discrimination prohibited on basis of individual's "race, color, religion, or national origin").

18. Plaintiff also challenges the County's definition of "Hispanic" as being both underinclusive and overinclusive. According to Plaintiff, the County's definition is underinclusive because certain Latin Americans, for example, would be excluded. He argues the definition to be overinclusive because it includes persons who are decendents of Hispanics. The County, however, utilizes the definition provided by the EEOC. This definition has survived constitutional scrutiny, *Espinoza v. Farrah Manufacturing Co.*, 414 U.S. 86 (1973). Further, the EEOC definition of "national origin" includes a person's "ancestor's place of origin." 29 C.F.R. §1606.1 (1987). Thus, plaintiff's theory does not support recovery on this claim.[9]

19. Finally, Plaintiff's argument that his veteran status was not considered is without merit. A perusal of the eligible list reveals that his veteran status entitled him to a score enhancement of 5 points. In fact, the list indicates

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[9] Plaintiff also argued that the County's hiring process is impermissible in the sense that no one verifies the accuracy of an applicant's declaration that he or she falls in a minority category. In other words, if an applicant states that he is of Hispanic decent, this information is not verified for purposes of employment. The Court unwilling to hold, on the basis of this contention alone, that such conduct is tantamount to impermissible discrimination.

that all but five applicants who scored higher than Plaintiff were veterans that received similar score enhancements. Plaintiff's Exhibit No. 12.

III. CONCLUSION

Plaintiff has failed to present evidence suggesting that the decision not to hire him was the result of discrimination by the County. In short, plaintiff has failed to meet its burden of invalidating the County's affirmative action program. Therefore, it is hereby

ORDERED AND ADJUDGED that judgment be entered in favor of the defendant, METROPOLITAN DADE COUNTY.

IT IS FURTHER ORDERED AND ADJUDGED that the parties shall submit memoranda of law on the issues of costs and attorney fees within ten (10) days from the date of this Findings of Fact and Conclusions of Law.

Judgment to be entered accordingly.

DONE AND ORDERED at Miami, Florida, this 25 day of April 1988.

/s/ Alcee L. Hastings
UNITED STATES
DISTRICT JUDGE
ALCEE L. HASTINGS

Copies to:
A. Kapetanakis, Esq.
J. McInnis, Asst. Dade County Attorney